IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1568 OF 2004
IN
SUIT NO.1455 OF 2004

Mahendra J. Vora ....Plaintiff

V/s.

Aditya Enterprises & Ors. ....Defendants

Mr.S.D. Parekh, Senior Advocate with Mr.Pooniwala, Mr.N. C.Parekh, Ms.M. M. Paladia and Ms.Dadwali/b Mansukhlal Hiralal & Co. for the Plaintiff.

Mr.D. D. Madon, Senior Advocate with Mr.Gaurav Kothari i/b Kanga & Co. for Defendant Nos.1 to 3.

Mr.R. S. Tripathi i/b J.R. Vakil & Associates for Defendant Nos.4, 5, 10 and 11.

Mr.L. M. Acharya for Defendant Nos.6 and 7.

Mr.M. M. Vashi with Ms.Varsha Sawant i/b Ms.Gauri Godse for Defendant No.8.

Mr.S. Nagvodaria i/b Mehta & Co. for the Applicants in Chamber Summons.

CORAM : S.J. VAZIFDAR, J.
DATE : 7TH/8TH DECEMBER, 2006.

ORAL JUDGMENT :-

1. The suit is filed inter-alia for a declaration that an

agreement dated 26.8.2002 has been legally and validly terminated with effect from 10.3.2004 and that the Defendants have no right and/or interest under the said agreement and in respect of the construction already put up by Defendant Nos.1, 2 and 3 thereon and for a mandatory injunction ordering the Defendants to remove themselves and their material from the suit property. The Plaintiffs have also claimed damages.

2. The Plaintiffs claim to be entitled to various rights in respect of the suit property. Development and other rights were granted by the Plaintiffs in favour of Defendant No.1 by an agreement dated 26.8.2002. Defendant Nos.2 and 3 are the partners of Defendant No.1.

Defendant Nos.1 to 3 in turn entered into agreements to sell in respect of nine flats in the proposed construction. As their interests are likely to be affected, by an amendment pursuant to an order dated 1.4.2005, Defendant Nos.4 to 15 were impleaded. By the said amendment the Plaintiffs sought a declaration that the agreements entered into by Defendant Nos.1 to 3 with them are void ab-initio and in any event not binding on the Plaintiffs.

3. By this Notice of Motion, the Plaintiffs have sought a mandatory order and injunction directing the Defendants to forthwith remove themselves and their materials and machinery from the suit premises and an injunction restraining the Defendants from entering and remaining upon the suit property and putting up any construction thereon and interfering with and obstructing completion of construction work and development by the Plaintiffs. Further, the Plaintiffs have sought an injunction restraining the Defendants from selling, encumbering, alienating or creating any third party rights in respect of the said project or any part thereof. Lastly, by the amendment the Plaintiffs have sought an order restraining Defendant Nos.4 to 15 from in any manner dealing with or disposing of the flats allegedly purchased by them. Mr.Parekh, stated that the Plaintiffs are not pressing prayer (b) by which the Plaintiffs have sought the appointment of a Court Receiver with a direction to appoint the Plaintiffs as their agents without security or royalty in order to develop and construct on the site.

4. It is to be noted that the prayers if granted would virtually amount to decreeing the suit and dismissing the counter-claim filed by

Defendant Nos.1 to 3 for specific performance. Mr.Parekh did not deny the same. He however submitted that the facts and circumstances of the case, warranted such orders even at the interlocutory stage.

5. It would require the Plaintiffs to make out not merely a prima-facie case but a virtually unanswerable case at the interlocutory stage to entitle them to an order substantially decreeing the suit. This would be even more so in a case where, if the Defendants were to succeed at the final hearing of the suit, it would not be possible for the Court to restore status-quo ante to undo the prejudice that the Defendants would suffer by reason of such an interim order.

6. In Assistant Collector of Central Excise, Chandan Nagar,West Bengal vs. Dunlop India Ltd. and ors. (*1985) 1 SCC 260* = equivalent SCC, the Supreme Court held as under :-

> "5**.** We repeat and deprecate the practice of granting interim order which practically give the principal relief sought in the petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other relevant considerations.
>
> ..... Incalculable harm has been done by

such interim orders. All this is not to say that interim orders may never be made against public authorities. There are, of course, cases which demand that interim orders should be made in the interests of justice. Where gross violations of the law and injustices are perpetrated or are about to be perpetrated, it is the bounden duty of the court to intervene and give appropriate interim relief. In cases where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens faith in the impartiality of public administration, a court may well be justified in granting interim relief against public authority. But since the law presumes that public authorities function properly and bona fide with due regard to the public interest, a court must be circumspect in granting interim orders of far-reaching dimensions or orders causing administrative, burdensome inconvenience or orders preventing collection of public revenue for no better reason than that the parties have come to the court alleging prejudice, inconvenience or harm and that a prima facie case has been shown. There can be and there are no hard and fast rules. But prudence, discretion and circumspection are called for. There are several other vital considerations apart from the existence of a prima facie case. There is the question of balance of convenience. There is the question of irreparable injury. There is the question of the public interest. There are many such factors worthy of consideration. We often wonder why in the case indirect taxation where the burden has already been passed on to the consumer, any interim relief should at all be given to the

manufacturer, dealer and the like."

7. It is true that this judgment was in a Writ Petition. Further the observations in paragraph 5 refer to the effect of the orders having caused loss to the public exchequer. However, the principle would normally apply to other cases as well. Interlocutory orders are meant to preserve the subject matter of the suit and thereby protect the rights of the party that ultimately succeeds. Unless an extremely strong case is made out, normally it would not be proper to pass an interlocutory order which virtually concludes the party at the final hearing without there being any possibility of restoring the status-quo ante if the other party finally succeeds. I do not rule out the possibility however of such an order being passed if a proper case is made out indicating a considerably high degree of certainty that the party seeking the order is bound to succeed at the final hearing of the suit.

8. As I shall demonstrate, in the facts and circumstances of this case, it is impossible to hold that the Defendants would certainly fail at the final hearing of the suit as contended by Mr.Parekh. Defendant Nos.1 to 3 have filed a counter-claim in which they have sought inter-alia specific performance of the said agreement. I cannot

rule out the possibility of the counter-claim being decreed either.

9. Mr.Parekh submitted that the Plaintiffs are bound to succeed in the suit on two grounds. Firstly, he submitted that the Defendants were guilty of various breaches the nature of which are such as to positively deny the Defendants any relief much less the relief of specific performance. Secondly, he submitted that the agreement being a mere development agreement specific performance thereof cannot and ought not to be granted.

10. By the said agreement, Defendant No.1 was, under the supervision of the Plaintiff's architect, engineers, etc., to complete the work of construction of a building consisting initially of four wings on the suit property. Subsequently another wing was added. I will refer to the relevant clauses while dealing with the submissions.

Re : The alleged breaches of the agreement by Defendant Nos.1 to 3 :

11. Mr.Parekh submitted that the breaches were of such a nature that the Court would undoubtedly come to the conclusion at this interlocutory stage itself that the suit is bound to be decreed and the counter-claim is bound to be dismissed. Basing himself on this

premise, he submitted that the reliefs claimed in the Notice of Motion ought to be granted despite the fact that the order would render the Defendants defence to the suit and the prayers in the counter-claim for specific performance infructuous at the final hearing of the suit.

12. The breaches alleged by the Plaintiffs against Defendant Nos.1 to 3 fall broadly under three categories. The first pertains to a breach of clauses 10 and 12 of the agreement, the second to clauses 3 and 5 of the agreement and the third to clause 18 of the agreement.

Sale of nine flats by Defendant Nos.1 to 3 to Defendant Nos.4 to 15 contrary to and in violation of clauses 10 and 12 of the agreement :

13. Mr.Parekh submitted that the Plaintiff sold nine flats to Defendant Nos.4 to 15 contrary to and in violation of the agreement and in particular clauses 10 and 12 thereof which read as under :-

> "10. In consideration of the aforesaid, it is agreed that Aditya enterprises may, subject to the terms hereof, become entitled to constructed residential flats/premises on Built-up area basis in the said one building to be constructed on the said remaining portions of Sector A being the project, in lieu of the cost

as above, upon completion of each stage of work as per the table below and in the manner hereafter appearing.

Item No. (1)	Stage of work completed in the one building (i.e. all four wings in the one building) (2)	Approximate area of the premises which Aditya Enterprises will become entitled to in lieu of costs as above. (3)
A.	On completion of work of Plinth and on commencement of further R.C.C. work	Residential premises admeasuring approx.5,000 sq.ft. Saleable area
B.	On completion of work of R.C.C. of fourth floor and on commencement of further R.C.C. work	Residential premises admeasuring approx.7,750 sq.ft. Saleable area
C.	On completion of work of R.C.C. of Top Floor (i.e. 7th or 8th) and on commencement of masonry work	Residential premises admeasuring approx.7,750 sq.ft. Saleable area
D.	On completion of work of mansory work of Fourth Floor and on commencement of masonry work	Residential premises admeasuring approx.3,500 sq.ft. Saleable area
E.	On completion of work of masonry work of Top Floor (i.e. 7th or 8th) and on commencement of Internal Plastering and Flooring masonry work.	Residential premises admeasuring approx.3,500 sq.ft. Saleable area

F.	On completion of work of Internal Plastering (including finishing plaster) and Flooring on commencement of External Plastering and Tiling.	Residential premises admeasuring approx.5,500 sq.ft. Saleable area
G.	On completion of work of External Plastering (including finishing plaster) and Tiling on commencement of work of Doors and Windows.	Residential premises admeasuring approx.5,500 sq.ft. Saleable area
H.	On completion of work of Doors and Windows and on commencement of Electrical and Plumbing work..	Residential premises admeasuring approx.2,000 sq.ft. Saleable area
I.	On Completion of work of Electrical and Plumbing work and on commencement of work of Fixing Lifts, Painting and Fixtures and Fittings.	Residential premises admeasuring approx. 3,000 sq.ft. Saleable Area
J.	On Completion of Fixing Lifts, Painting and Fixtures and Fittings and on commencement of all balance work including work of gardens, compound, gates, staircase lobbies, etc., and finishing work including installing Fire-fighting equipment, if required.	Residential premises admeasuring approx. 2,200 sq.ft. Saleable Area
K.	On completion of work of all balance work including work of gardens compound, gates, staircase lobbies, etc., and finishing work including installing fire-fighting equipment, if required, and making the premises ready for Possession with electricity and water.	Residential premises admeasuring approx. 2,200 sq.ft. Saleable Area

L.	On obtaining of Occupation Certificate for the one building	Residential premises admeasuring approx. 2,200 sq.ft. Saleable Area
M.	On expiry of three years from the date of obtaining Occupation Certificate as above, subject to what is stated in clause 14 herein below.	Residential premises admeasuring approx.780 sq.ft. Saleable Area
	Total	50,880 sq.ft. built-up area of Residential premises

The final figures of areas shall vary proportionally with the exact/actual area approved as per the final approved plans. The more particularly description of the premises which the Aditya Enterprises may become entitled to, subject to the terms hereof, is more particularly set out in the schedule annexed hereto and marked as Annexure '2". The Voras shall ensure that the flats, which the Aditya Enterprises will become entitled to, shall be free from all encumbrances including mortgage and charge.

12. It is agreed that only on completion of particular stage of work as mentioned in column (2) of the table in clause 10 hereinabove, the Aditya Enterprises shall obtain a certificate from the Voras' architects M/s. H.A.Mehta, Architects and Engineers, to the effect that the work up to that stage is completed in all respects in accordance with this agreements and as per the approved

> plans and specifications and as per the rules, and thereupon the Aditya Enterprises shall become entitled to the said premises as provided in column (3) of the table in clause 10 hereinabove. Upon becoming so entitled to such premises, the Aditya Enterprises shall have the right to sell such premises in their own name in such manner as they deem fit, and they shall be responsible and liable to carry out the terms and conditions of such transactions/ agreements for sale executed by them on principal to principal basis, and the Voras shall not be in any way liable or responsible for performance of any of the obligations including the obligation as mentioned in Maharashtra Ownership Flat Act qua the said premises purchasers or any other persons and the Aditya Enterprises shall be solely liable and responsible and shall observe, perform and comply with the obligations including the obligation as mentioned in Maharashtra Ownership Flats Act. Upon Aditya Enterprises becoming so entitled to sell their premises, they shall be entitled to independently sell the said constructed premises in their own names, and on such sale, Aditya Enterprise shall be entitled to appropriate the entire consideration arising therefrom for their absolute use and benefit, without accounting for the same to the Voras."

14. Mr.Parekh submitted that Defendant No.1 had sold nine flats to Defendant Nos.4 to 15 though they were not entitled to do so in view of clauses 10 and 12 of the agreement. According to him

Defendant Nos.1 to 3 were not entitled to the premises to the extent mentioned in column 3 of item-A viz. “approx 5000 sq. ft.” or any portion thereof for four reasons. Accordingly, therefore, he submitted, Defendant Nos.1 to 3 were not entitled to enter into agreements for sale of the said flats to Defendant Nos.4 to 15 in view of clause 12 of the agreement.

15. I have found none of the four grounds to be well founded. It would however be convenient to preface a consideration of Mr.Parekh's contentions by dealing with two of Mr.Madon's submissions, which I find well founded and constitute a defence to each of Mr.Parekh's contentions even assuming that the same are factually established.

16. Firstly, clauses 10 and 12 do not contain a bar against Defendant No.1 entering into agreements to sell the flats to be constructed on the suit property. The first sentence of clause 12 specifies when Defendant No.1 becomes “entitled” to the said premises. The next sentence provides that upon Defendant No.1 becoming “entitled” to the premises they shall be entitled to sell the same. The expression “sell” therefore refers to an agreement of sale

and not an agreement to sell. The clause does not even impliedly restrain agreements to sell. I do not read clause 12 as implying the negative either viz. as a restraint against Defendant No.1 even from entering into agreements to sell prior to Defendant No.1 becoming entitled to the premises.

17. The least that must be said in favour of Defendant No.1 is that clause 12 is not so clear as to unequivocally provide that Defendant No.1 was not entitled even to enter into agreements to sell the flats. The scope and ambit of the expression “shall have right to sell such premises” requires to be interpreted. It is a moot point, to say the least, as to whether the expression refers to agreements for sale or whether it refers to agreements of sale.

18. Further, Mr.Madon with considerable force relied upon clause 38 of the said agreement which reads as under :-

> 38. It is agreed that in case the Aditya Enterprises fails or is other wise unable to observe, perform or comply any of the terms, conditions, covenants or obligations as mentioned herein, for any reason whatsoever or in case the Aditya Enterprises fails or is otherwise unable to undertake or complete the

construction work in accordance with the terms of this Agreement for any reason whatsoever, then the Voras shall be entitled to terminate the appointment of the Aditya Enterprises and also terminate this Agreement and appoint a new contractor to complete the said project. On such termination, the Aditya Enterprises shall, save and except as mentioned in clause 39, not be entitled to claim or receive any money or premises either towards the cost of construction or towards any expenses, costs, charges incurred by them in connection with the Project. The Aditya Enterprises shall also not be entitled to claim any loss or damages on account of such termination from the Voras. Provided however that the Voras shall before terminating this Agreement, give a notice to the Aditya Enterprises requiring the Aditya Enterprises to make good the default or breach within a period of 30 (thirty) days from the date of receipt of such notice and Aditya Enterprises has failed, neglected or otherwise unable to make good the said default or breach. It is agreed that the right of the Voras to terminate this Agreement is without prejudice to

> Voras' other rights and remedies that the Voras may have against the Aditya Enterprises either in law or as provided in this Agreement or otherwise." (emphasis supplied)

19. It is not disputed that a notice in accordance with clause 38 was not served by the Plaintiffs on Defendant No.1.

Mr.Parekh however submitted that the clause does not make it mandatory upon the Plaintiffs serving such a notice and that the mere absence of such notice would make no difference. I am unable to agree.

20. Such clauses are common in agreements including construction contracts. The purpose of such clauses is to ensure that agreements are not terminated merely on account of breaches having been committed. Such clauses are meant to afford a party committing a breach, an opportunity of remedying the same. It is an important right in favour of a party committing a breach. Such clauses are an essential term of a contract. There is nothing to suggest that the clause was not to be acted upon for any reason.

21. The least that must be said in favour of Mr.Madon's submission founded upon clause 38 is that it is a point which certainly

warrants consideration at the trial of the suit and counter-claim and it cannot by any stretch of imagination be rejected at the interlocutory stage.

22. This brings me to a consideration of the four grounds based on which Mr.Parekh contended that Defendant Nos.1 to 3 had not become entitled to the premises mentioned in column 3 of item A to clause 10 of the agreement.

23. Firstly, he submitted that on a true and proper interpretation of column 2 qua item “A” of the table in clause 10, RCC work ought to have commenced in respect of all five wings. That not having been done, Defendant Nos.1 to 3 had not become entitled to “approx. 5000 sq.ft.” under column 3 of the table.

24. The plain language of column 2 does not support this contention. It does not provide that the RCC work ought to have commenced in respect of all the wings. It merely states that the work of RCC ought to have commenced. That the RCC work had commenced is not in dispute.

25. The least that must be stated in favour of Defendant No.1 at this stage is that the matter is not free from doubt as contended by Mr.Parekh.

26. It is not clear from the record as to when RCC work actually commenced. This mater assumes significance in view of the rival contentions between the parties regarding the date of the agreements between Defendant Nos.1 to 3 on the one hand and the remaining Defendants on the other. Relying upon the affidavits filed by/on behalf of Defendant Nos.4 to 15, Mr.Parekh submitted that the agreements were not entered into on the date of the formal agreements executed between the parties but prior thereto, on the date on which the deposits were accepted. There is some force in the argument. For instance in some cases even before the formal agreements were executed the amounts were paid from time to time. This would indicate that such amounts were paid pursuant to an agreement and not merely as a token amount only for booking the flats. However even assuming this to be as it would be of no assistance to the Plaintiffs considering the views that I have taken.

27. Secondly, Mr.Parekh submitted that for the work completed

upto the stage mentioned in item “A” of column 1 of clause 10, Defendant No.1 was entitled to sell the “premises admeasuring approx. 5000 sq.ft saleable area” (emphasis supplied). According to Mr.Parekh, Defendant No.1 sold 5015 sq.ft. built up area thereby committing a breach of clause 10. The submission is not tenable.

28. Nowhere in the pleadings has the Plaintiff alleged that an area in excess of 5000 sq.ft. was sold. In fact in paragraph 29(viii)(a) of the plaint the Plaintiffs have alleged that Defendant No.1 sold 4908 sq.ft. saleable area. There is no amendment to the plaint in this regard. In the correspondence, Defendant No.1 expressly stated that by a letter 2.3.2004, nine flats aggregating to 4828 sq.ft built up area had been disposed of. It would be unfair to the Defendants to permit the Plaintiffs to contend contrary to their own case on such questions of fact. This is more so considering the fact that even in the notice of termination dated 10.3.2004, the Plaintiffs alleged that Defendant No.1 had purported to sell 4825 sq.ft built up area.

29. Moreover even assuming, as alleged by Mr.Parekh, that 5015 sq.ft built up area had been sold, it would make no difference for the right of Defendant No.1 is to sell “approx. 5000 sq.ft.” (emphasis

supplied.) I am unable to agree that 15 sq.ft in excess of 5000 sq.ft would not fall within the ambit of the term “approx.” (approximate).

30. Further, as Mr.Madon pointed out, even as per the agreements with Defendant Nos.4 to 15, the built up area is only 4712 sq.ft.

31. Faced with this, Mr.Parekh submitted that as per the agreements tendered in Court, the area agreed to be sold by Defendant No.1 to Defendant Nos.4 to 15 was 5620 sq.ft saleable area. He was however unable to clarify the basis for the computation of the saleable area or to define the term clearly. In any event this allegation was taken only across the bar and had not either been made in the correspondence or dealt with in the pleadings. In the facts and circumstances of this case,it would not be fair to the Defendants to permit the Plaintiffs to advance such contentions without any pleadings.

32. Thirdly, Mr.Parekh submitted that in any event under clause 12, Defendant No.1 was not entitled to sell the said flats without a certificate from the Architect precisely in terms of the language of clause 12.

33. The Architect was appointed by the Plaintiffs. The certificates state that the works mentioned therein were completed. It is true that the certificates do not use the language of clause 12 verbatim. It is difficult to hold at the interlocutory stage that the certificates not having been worded precisely in terms of the language of clause 12 would disentitle the Plaintiff to sell the said flats. This is for two reasons.

34. Firstly, clause 12 is a term in a construction contract. It is neither a letter of credit nor a guarantee which ought to be construed strictly. There is nothing in the agreement in general or in clause 12 in particular which warrants such a strict construction.

35. Secondly, it is a moot point whether even if the Architect had not furnished the certificate, Defendant No.1 would be deprived of a right to sell the flats as contemplated by the agreement. For instance, if Defendant No.1 is able to establish that the work at the relevant time had been completed as contemplated in clause 10, it may be open to Defendant No.1 to contend that they would be entitled to sell the flats even if the Architect had not issued the certificates. This would be so if for instance the certificate had not been issued due to negligence or mala-fides.

36. Fourthly, Mr.Parekh submitted that there were no sanctioned plans in respect of the construction as had actually taken place. He submitted that the amended plan has not been sanctioned. In view thereof also he submitted that Defendant Nos.1 to 3 could not have sold the said flats.

It is important to note that Mr.Parekh clarified that it was not his submission that the Plaintiffs could have terminated the agreement due to the construction not being in accordance with the sanctioned plans. His contention was that in view thereof, Defendant Nos.1 to 3 could not have sold the said flats.

37. Firstly this alleged breach has not even been pleaded in the present Notice of Motion or in the plaint. This is for obvious reasons. A mere glance at the revised plan demonstrates that this is really the Plaintiff's attempt to make a mountain of a mole hill. Mr.Madon tendered a chart in which juxtaposed are the previous plan and the revised drawing. There is in fact only an extremely minor change - the drying are admeasuring about 8 sq.ft adjacent to the toilet was taken into the toilet itself. The change is really insignificant. Moreover the change was made by the Defendants admittedly as per the directions of an Architect. According to Defendant No.1, the Architect was appointed by the Plaintiffs. The Plaintiffs deny the same. For the present purpose, it is sufficient to note that DefendantNo.1 acted as per the instructions of an Architect at site. One thing is clear - the parties were aware that the said Architect/consulting Architect – Philips & Mehta were acting in the matter. This is evident from a letter dated 8.7.2003 addressed by the Plaintiffs to DefendantNo.1 where they state that they had received certain calculations of the built up area from the said consulting Architect. Accordingly the Plaintiffs forwarded to the Defendants

revised distribution of the premises. The same consulting Architect had directed Defendant No.1 to carry out the minor modifications by their letter dated 21.12.2002. The Defendants cannot be faulted for the same.

38. The submissions on behalf of the Plaintiffs based on clauses 10 and 12 of the agreement are therefore rejected.

Re : Alleged breach of clauses 3 and 5 of the agreement :

39. Mr.Parekh submitted that Defendant No.1 had committed a breach of clauses 3 and 5 of the agreement which read as under :-

> 3. Aditya Enterprises shall, at their costs, charges and expenses of obtain further/full CC for the one building and consisting of four wings being the project.
>
> 5. The Aditya Enterprises shall at its own costs, charges, expenses and risk;
>
> (b). complete the entire construction work of the Project i.e. the said one building and obtain Occupation certificate in respect of the said building within 18 (eighteen) months from the date of sanctioning of plans by MCGM for the full IOD and issue of commencement certificate (CC) upto plinth level in respect of each wing. It is agreed that if within said period of 18 months the Aditya Enterprise is unable to obtain Occupation

> Certificate, then in that event Aditya Enterprises shall be given 6 months grace period for completing the construction and for the purpose of obtaining Occupation Certificate.
>
> (e) comply with all conditions of amended/revised lay out in respect of the said Project/Sector A."

40. The argument is without any force. It is true that under clauses 3 and 5, it was the duty of Defendant Nos.1 to 3 to obtain the C.C. and the occupation certificate. In respect of the FSI of 30,000 sq.ft. which was already available, the same has been done. In respect of the balance 66000 sq.ft. FSI, it was the duty of the Plaintiffs to first procure the additional FSI. Clause 2 expressly provides that the Plaintiffs shall at their costs, charges, expenses and risk make available an aggregate of approximately 96000 sq.ft. FSI. Further, under clause 2(b) it is the responsibility of the Plaintiffs to obtain full IOD including of the TDR areas in the phases mentioned therein. Clause 2 reads as under :-

> "2. The Voras shall at their costs, charges, expenses and risks :
>
> (a) make available in aggregate approximately 96,000 square feet built-up are as defined herein as per the tentative plans prepared by

> the parties (which includes balance FSI and TDR. FSI as per the rule for the time being) for the Project, including to purchase FSI by way of TRANSFER OF DEVELOPMENT RIGHTS (i.e TDR FSI) from outside to the extend permissible/necessary to be consumed on the said project at their own cost;
>
> (b) obtain full IOD including Transfer of Development Rights area in phases as follows:
>
> (i) Approx. 3220 sq. mts in form of General TDR FSI within 3 months of completion of plinth of all 4 wings. (ii) Approx. 1779 sq. mts. In form of Slum TDR FSI within 6 months of completion of plinth of all 4 wings. and CC upto plinth level for all 4 wings in the building being the project."

41. Admittedly the Plaintiffs had obtained neither the TDR nor the IOD. In the circumstances the question of Defendant No.1 procuring the C.C. could not have arisen and did not arise.

Re : Alleged breach of clause 18 of the agreement :

42. Lastly in respect of the alleged breaches, Mr.Parekh submitted that Defendant No.1 had failed to make payment as per clause 18 of the agreement which reads as under :-

> "18. It is agreed that :-

(a) Aditya Enterprises shall, on execution hereof, pay to/place with the Voras, the Security Deposit of Rs.55,00,000/- (Rupees Fifty Five Lakhs only) as interest free Security Deposit for due performance of the terms and conditions inter alia of this Agreement and which deposit shall be refunded to Aditya Enterprises by Voras upon completion of the Project without any interest.

(b) The Aditya Enterprises will pay a sum of Rs.45,00,000/- (Rupees Forty Five Lakhs only) as additional deposit at simple interest of 24% per annum and such additional deposit shall be refunded to Aditya Enterprises by Voras upon completion of project alongwith interest. The 45,00,000/- additional deposit security will be paid as follows :-

(i) Rs.25,00,000 (Rupees Twenty Five Lakhs only) within 30 days from the date obtaining IOD and plinth C.C. of Approx. 30000 Sq.Ft.

(ii) Rs.20,00,000/- (Rupees Twenty Lakhs only) within 60 days from the date of obtaining IOD and plinth C.C of approx. 30000 Sq.Ft.

(c)(i) Mahendar J. Vora and Others will give 3150 Sq. Ft. of residential premises in the existing 30000 Sq.ft. area as security towards Rs.55,00,000/- (Rupees Fifty Five Lakh only) interest free security deposit.

(ii) The sum of Rs.55,00,000/- (Rupees Fifty Five Lakhs only) interest free security deposit shall be refunded to the Aditya Enterprises within 60 days from the date of Aditya Enterprises complying their obligation under this Agreement and obtaining O.C., certificate of 100% work completion from Architect, payment of all outstanding liabilities, if any, in respect of the said project like outstanding taxes, charges, professional fees, contractor/sun-contractors charges and fees, etc., and handing over possession to the Voras even if the Voras and/or their nominees of the flats retained by the Voras even if, the Voras do not comply their obligations under this agreement, failing which the Aditya Enterprises is entitled to dispose and sell the flats given to them as security against the said deposit at the prevailing market price and appropriate the sale proceeds towards the interest free security deposit and balance if any is to be recovered from the Voras and in the event of surplus the same is to be reimbursed to the Voras.

(iii) Mahendra J. Vora and others will give 3500 Sq.ft. of residential premises in the wings where TDR FSI is to be utilized as security towards Rs.45,00,000/- (Rupees Forty Five Lakhs only) additional security deposit.

(iv) The sum of Rs.45,00,000/-(Rupees Forty Five Lakhs only) security deposit alongwith interest shall be refunded to the Aditya Enterprises within 60 days from the date of Aditya Enterprises complying all their

obligations under this Agreement, and obtaining O.C., certificate of 100% work completion from Architect, payment of all outstanding liabilities, if any, in respect of the said project like outstanding taxes, charges, professional fees, contractors/sub-contractors charges and fees, etc. and handing over possession to the Voras and/or their nominees of the flats retained by the Voras even if the Voras do not comply their obligations under this agreement, failing which the Aditya Enterprises is entitled to dispose and sell the flats given to them as security against the said deposit at the prevailing market price and appropriate the sale proceeds towards the additional security deposit and interest and balance if any is to be recovered from the Voras and in the event of surplus the same is to be reimbursed to the Voras.

(d) The said flats to be kept aside as security for Aditya Enterprises shall be earmarked upon final approval of the plans and the same shall be reduced in writing thereafter. It shall be the option of the Voras as to which flats are to be kept as security for Aditya Enterprises against the deposits paid by them/ to be paid by them. In case the Voras so desire, they may unilaterally change/exchange/replace the flats kept aside as security as many times and at such time as they deem fit. Provided however that the area of the flats changed/exchanged/replaced, and that plans for such changed/exchanged/replaced flats are approved. Also provided, however that flats

> equivalent to the total area given as security shall always be kept unsold/unencumbered by the Voras until repayment of the said deposit. In case of such change/exchange/replacement the Voras shall intimate the said Aditya Enterprises of such change/exchange/replacement specific writing/notices.

43. Mr.Parekh admitted that Rs.55.00 lacs had been paid under clause 18(b). However, he submitted that out of a sum of Rs.45.00 lacs to be paid as per clause 18(b), only a sum of Rs.10.00 lacs had been paid leaving a balance of Rs.35.00 lacs.

44. It is true that a sum of Rs.10.00 lacs out of Rs.45.00 lacs under clause 18(b) was paid. There is however more than just a valid explanation for the same. It must be noticed firstly that clauses 18 (a) and (b) ought to be read together. They provide for a security deposit. This is clear from the word “additional deposit” in clause 18 (b). Under clause 18(c)(i), the Plaintiffs were required to provide security in the form of 3150 sq.ft of residential premises in the existing 30,000 sq.ft area. Under clause 18(c)(iii), the Plaintiffs were to provide security of further 3500 sq.ft of residential premises in the wings where TDR/FSI is to be utilized as security towards Rs.45.00 lacs referred to in clause 18(b).

45. I will presume that the time for creating the security under clause 18(c)(iii) had not arrived by the time the obligation for the payment of Rs.45.00 lacs under clause 18(b) had accrued. It is however, important to note that prima-facie the security as contemplated under clause 18(c) had not been furnished by the Plaintiffs. In September, 2002, the first IOD had been obtained. On 17.10.2002 the first commencement certificate had been obtained. The time to pay the first tranche of Rs.25.00 lacs under clause 18(b)

no doubt had arrived on 17.11.2002. It is however admitted that during this time, the parties were attempting to amend the plans. It is further admitted that pursuant thereto, applications for amendment of the IOD and CC were made. They were obtained on 27.1.2003 and 24.3.2003 respectively. Prima-facie, it appears that even before 17.11.2002, the amendment to the plans was being discussed/contemplated. Mr.Parekh was unable to crystallize the dates. The security contemplated under clause 18(c) of 3150 sq.ft had been identified and ear-marked namely five flats aggregating to 3140 sq.ft i.e less by 10 sq.ft. As a result of the amended plans, the configuration of the flats changed and only four flats were available admeasuring 2363 sq.ft. Thus the short fall in the security was 777 sq.ft. There is no dispute regarding the same. The parties were naturally at this stage at issue on the question of making up the short fall of about 20% in the security. In these circumstances, it is impossible to hold that Defendant No.1 was in breach of the obligation to pay a sum of Rs.35.00 lacs. Defendant No.1 has in detail set out inter-alia the aforesaid facts in paragraphs 9 and 11 of the affidavit in reply to the Notice of Motion.

46. To reiterate, even assuming that the four grounds were established, the Plaintiffs would not be entitled to terminate the agreement in view of their not having issued a notice in accordance with clause 38 of the agreement and in view of clauses 10 and 12 not prohibiting Defendant Nos. 1 to 3 from entering into agreements for sale of the said flats.

Re : Whether specific performance of a development agreement can never be granted :

47. Mr.Madon submitted that if the Defendants establish that the suit is likely to be dismissed on any ground, Mr.Parekh's contention regarding the Defendants not being entitled to specific performance even if well founded, would make no difference. For in that event, Defendant No.1 would continue to remain in possession of the property. The submission is based inter-alia on the Plaintiffs non-compliance with clause 38 of the agreement. This certainly is a question which will arise for consideration at the final hearing of the suit.

48. Mr.Parekh submitted that in any view of the matter, the Defendants cannot obtain specific performance of the said agreement as it is merely a development agreement.

49. Both the counsel relied upon several judgments of this Court I have come to the conclusion that there is no absolute principle that specific performance of a development agreement can never be granted.

50. It would be convenient to deal first with the authorities which have led me to this conclusion and thereafter to examine the authorities cited on behalf of the Plaintiffs in support of their contention to the contrary.

51(A). Mr.Madon relied upon an unreported judgment of this Court dated 24.10.1996 in *M/s.Amar Pratik Builders (I) Pvt. Ltd. versus Kanjibhai Bhanabhai Patel & Another* in Notice of Motion No.2475 of 1993 in Suit No.3872 of 1993. In this case the developer succeeded in obtaining interim reliefs. The Plaintiff had taken various steps such as appointment of an architect, submitting construction plans to the B. M. C., obtaining approval and sanction from the B.M.C. and had demolished a dividing wall on the property. It was contended that specific performance of a development agreement cannot be granted and the Plaintiff's remedy would only be in damages. The learned

Judge noted the various steps taken by the Plaintiff ; that the same was done with the knowledge and consent of the Defendants and that subsequently development work had been done. The learned Judge therefore held that there was a valid agreement between the parties which did not disentitle the Plaintiff to the relief of specific performance.

(B). Each of the facts present in the above case are present in the case before me. The judgment clearly supports the Defendants' case. It indicates that specific performance of a development agreement can, depending upon the facts and circumstances of the case, be granted.

52(A). Mr.Madon then relied upon the judgment of another learned single Judge in *M/s.Jyoti Homemakers Pvt. Ltd. versus M/s.Gondhalekar Holdings Pvt. Ltd. & Anr. 1999(11) LJ SOFT, 61 = 1999 ALL MR 327.* The Respondent was appointed as the developer under a development agreement. Under the agreement, the Respondents were granted marketing rights of the units to be constructed by them and they were entitled to sell all or any of the units at a price to be fixed by them without any interference from the

Appellants.

In this case too, the developer had paid substantial amounts under the development agreement, had completed construction to the extent of about 80 per cent of the work and had entered into agreements for sale of the units with third parties. The learned Judge held as under :-

> “10. It is no doubt true that on behalf of the Appellants it is contended that this is a Development Agreement and a Development Agreement cannot be specifically enforced. Counsel has relied on various Judgments of this Court in support of that contention. There is no dispute that this Court has taken a consistent stand in so far as Development Agreements are concerned that damages and not specific performance can be granted by way of relief. In cases however where pursuant to Development Agreement parties have spent substantial amount of money in raising constructions and have entered into agreement with third parties then such Agreement can be enforced. At any rate there is no suit

> for performance of the contract. We are only dealing with the issue of a suit filed by the Respondents against the Appellant for injunction on the ground that the contract stands terminated." (emphasis supplied).

(B). The facts in the present case are similar to the facts in the above case. Indeed, the facts of the present case go further and *a fortiori* support the Defendant's case.

(i). In the present case, substantial work has been carried out by Defendant No.1 on the property. All the plans had been submitted to the concerned authorities. The plans were sanctioned by the concerned authorities. In the first stage, 30,000 sq.ft. was to be built, the balance 66,000 was to be built after the Plaintiffs obtained the T. D. R and IOD for the same. Defendant No.1 has constructed the entire 30,000 sq.ft. In any event the construction to that extent is substantially complete.

(ii). An additional feature of considerable importance in the present case is clause 40 of the agreement which reads as under :-

> "40. It is further agreed that even after termination of this Agreement, in respect of the residential premises

> which the Aditya Enterprises has become entitled to in terms of this Agreement, the Aditya Enterprises shall be solely liable and/or responsible and shall complete the construction thereof and handover possession thereof to the Premises Purchasers and shall be liable and responsible to all the obligations including the obligation as contained in the Maharashtra Ownership Flats Act as if the Aditya Enterprises is the Promoter in respect of the said residential premises. The Voras shall not be liable or responsible for the same. “

Thus even assuming that the agreement was validly terminated by the Plaintiff, Defendant No.1 is solely liable and/or responsible to complete the construction and hand over possession of the premises to the purchasers. Defendant No.1 is also liable and responsible for all obligations under the Maharashtra Flats Ownership Act as if DefendantNo.1 was a promoter in respect of the residential premises.

(iii) Clause 40 in turn has another important feature. It now involves the rights of third parties which the Plaintiffs cannot ignore. Third parties have been impleaded as

Defendant Nos.4 to 15. It is impossible at this stage to state that Defendant Nos.4 to 15 will not be able to establish any rights or defense to the suit.

(C) The judgment supports the Defendant's case. Apart from being bound by the judgment, I am in respectful agreement with the same.

53(A). An unreported judgment of a Division Bench of this Court dated 25.9.1991 in *Mrs.Pallavi R. Karani versus M/s.Dadhawala Builders Pvt. Ltd. and others* (Appeal No.784 of 1991 in Notice of Motion No.2743 of 1990 in Suit No.3067 of 1990) was not cited before me. I therefore, invited the attention of all the counsel in the matter to the judgment before delivering my judgment. This judgment has remained unnoticed in all the judgments relied upon by Mr.Parekh which I shall deal with shortly. The judgment in *M/s.Jyoti Homemakers Pvt. Ltd.* (supra) is consistent with the judgment of the Division Bench in this case.

(B). In *Mrs.Pallavi R. Karani's* case also the I. O. D. and C. C. had been obtained, construction was almost complete, letters of allotment had been issued by the second

Defendant to the intending purchasers and the payment in respect thereof had been received partly. It was contended before the Division Bench, as it was contended before me, that specific performance of the agreement could not be granted. Reliance was placed on the order and judgment of a Division Bench of this Court which was also relied upon by Mr.Parekh in *Narayanan Ramchandra versus Mahabhodhi Society of India & Ors. (Appeal No.285 of 1988 in Notice of Motion No.76 of 1987 in Suit No.3419 of 1986 dated 7.3.1988)*. The Division Bench held as under :-

> "We have perused the order dated 7th March 1988 of the Division Bench (Lentin and Mrs Manohar JJ.) in Appeal No.285 of 1988 in Notice of Motion No.76 of 1987. The Division Bench has held that the agreement before them showed that the aim of the professional builder who was the appellant was to make a profit by completing and selling the flats in the building at a profit. A breach of such an agreement could be compensated by way of damages. Therefore, the learned judges agreed with the view to that effect

> taken by the learned single judge. We do not think that the order can be read as laying down that specific performance of a development agreement can never be granted or that interim relief in such a suit should always be refused. (emphasis supplied).

(C). The judgment is a complete answer to Mr.Parekh's extreme proposition that specific performance of development agreement can never be granted.

54. The expression “development agreement” is used rather liberally in relation to property transactions which are not agreements for or of sale or lease simpliciter or mere construction contracts. Development agreements generally involve the introduction/participation of a person/party who actually carries out construction on the property of another for consideration the nature of which varies from contract to contract. For instance the developer may be entitled to retain absolutely a part of the construction or to sell the same and appropriate the sale proceeds. The developer often is required under the agreement to obtain all

permissions and sanctions necessary to do the construction work. All this requires an enormous amount of time, effort and finances. An absolute inflexible rule prohibiting specific performance of all development agreements would work extremely unfairly to developers who may have invested their resources pursuant to the agreement or otherwise altered their position to their deteriment.

55. For instance a developer may have completed most of the work leaving incomplete only a small part of the work. If the agreement is at that stage allowed to be terminated by the owner who has received the full consideration or even a substantial part thereof it would be unfair to the developer in the extreme. In such circumstances there would operate against the other party an estoppel against terminating the contract having induced the developer to have altered his position to his detriment.

56. It is neither possible nor desirable to enumerate exhaustively the circumstances in which specific performance of a development agreement can be granted.

It would depend on the nature of the agreement and the facts and circumstances of each case. It is important always to distinguish between development agreement and mere construction contract. In the latter it would generally be difficult to sustain a clause for specific performance.

57. This brings me to a consideration of the judgments relied upon by Mr.Parekh.

58(A). By an unreported order and judgment dated 18.1.1988 in the case of *Assu Rihalani versus Wilfred D'Souza* in Notice of Motion No.2716 of 1987 in suit No.2673 of 1987, a learned single Judge considered the case for specific performance of a development agreement. The agreement contemplated a payment of Rs.2,85,000/- to the owners in consideration whereof the Plaintiff was permitted to develop the property and to construct a building thereon in which the flats were to be sold by the Plaintiff as per the requirements and guidelines of the lessors of the land namely Salset Cathelic Co-operative Housing Society. The agreement also provided for various

other things to be done such as the Plaintiff/developer providing the owners and tenants temporary alternative accommodation.

It is important to note that apart from having paid a sum of Rs.25,000/-, nothing had been done as far the Plaintiff was concerned. After a period of two years, the Plaintiff's advocate asked for investigation of the documents of title.

(B). Mr.Parekh relied upon two sentences in paragraph 8 (inadvertently numbered as 7) in support of his contention that specific performance can never be granted of a development agreement. The judgment however ought to be read as a whole. So read, I do not think it supports the extreme proposition canvassed by Mr.Parekh. The two paragraphs, both numbered as 7, read as under :-

> "7. Even otherwise Mr.Muchala has argued that prima facie this is not an agreement to sell but this is an agreement to develop the property. He has submitted that having regard to the terms of the contract and having regard to the provisions of Section 14 of the Specific Relief Act, 1963 such an agreement cannot be specifically enforced. Prima facie I am inclined to agree with the submissions made by Mr.Muchala in this behalf. I must mention that the property

belongs to the Society which has imposed various restrictions as to development of this property. Therefore, prima facie it is difficult for a member of the Society to enter into an agreement and to have the property sold to a non-member. I must,therefore, necessarily proceed on the assumption that it is an agreement to develop. If one has regard for the terms of this agreement with regard to the requirement as to the tenants vacating the property and the tenants and the owners being accommodated in a suitable alternative accommodation temporarily elsewhere and having regard to various other conditions of this agreement, it must prima facie be held that it is not an agreement which could be specifically enforced. Therefore, even from the point of view,no relief can be given to the Plaintiff at this stage.

7. Mr.Shah for the Plaintiff submitted that the 1st and 2nd defendant cancelled this agreement by their letter dated 25thAugust 1987, but the defendants have not made time the essence of the contract and, therefore, the termination or cancellation of the agreement appears to be prima facie bad in law. I need not go into these questions, because ultimately one has to consider the agreement together with the facts and circumstances of the case. The facts show that the plaintiff was not in a position to develop within the period contemplated under the agreement. It was not an agreement to sell. The plaintiff was to develop and sell flats, may be, to Christians, and earn his profit. Therefore, in such a case, if the agreement was put an end to, at the highest,the remedy of the plaintiff could be by

> way of damages, and there is no question of specific performance of this contract."

(C). The judgment really was based upon the facts of the case. The learned Judge himself observed that it was only a prima-facie view. Further the second sentence in the first paragraph 7 makes it clear that it was "having regard to the terms of the contract and having regard to the provisions of Section 14 of the Specific Relief Act such an agreement cannot be specifically enforced." Thus even reading the portion relied upon by Mr.Parekh, it is clear that the learned Judge did not intend to lay down as an absolute proposition of law that specific performance of a development agreement can never be granted. It would depend upon the nature of the agreement and the terms and conditions thereof.

As I have noted earlier the only thing that had been done in that case was the payment of about 10 per cent of the consideration. In the case before me, the nature of the agreement is entirely different. The Defendants under clause 10 became entitled albeit in view of the costs, to the residential premises depending upon the stage and extent of work. The Defendants are not bound to sell these premises. Defendant Nos.1 to 3 are entitled to retain the same if

they so desire. I have earlier also set out in some detail the extent of payments made, work done and that agreements had been entered into with third parties in the present case. These facts clearly distinguish the facts of this case from the fact of the case before me.

(D) If such an absolute proposition was intended, the judgment is clearly impliedly overruled by the judgment of the Division Bench in *Mrs.Pallavi R. Karani*' case (supra).

59. By an unreported order and judgment dated 9.2.1988 in *Narayanan Ramchandran vs. Mahabhodi Society & Ors.,* in Notice of Motion No.76 of 1987 in Suit No.3419 of 1986, a learned single Judge dismissed the application for interim reliefs at the instance of the developer who had filed the suit for specific performance. The judgment does not refer in detail to the facts of the case or even to the details of the suit agreement. It must be noted however that in paragraph 5, the learned single Judge observed : “If one goes through the agreement, it will be seen that this is not an agreement to sell nor an agreement to lease, it is a simple agreement to develop the property belonging to the Trust on certain terms and conditions.” (emphasis supplied).

As I have observed earlier, the suit agreement cannot by any stretch of imagination be termed a “simple agreement to develop the property.” The judgment is therefore of no assistance to the Plaintiff.

60(A). Appeal No.285 of 1988 (*Narayanan Ramchandra versus Mahabhodi Society of India and Others*) was filed against the above judgment and order. By an unreported judgment dated 7.3.1988, a Division Bench held as under:-

> “In essence the suit agreement where the aim of the professional builder contractor (appellant) is to make a profit by completing building and selling the flats at a profit.
>
> A breach of such an agreement can be compensated by way of damages.
>
> Merely because a temple and a guest house for devotees were also to be constructed within the plot makes no difference to the essence of the development agreement, while we applaud the pious zest of the professional builder contractor in seeking to ameliorate the spirits and

> material comforts of the devotees, the essence of the contract still remains a building contract entered into with the aim of making profits by the expedient of constructing the building and selling the flats at a profit, we agree with the learned single judge that damages for breach of such a contract would be the adequate remedy."

Considerable emphasis was placed on this order by Mr.Parekh. It has also been followed by later judgments which I shall refer to shortly.

(B). It is however important at this stage to note two things. Firstly, the Division Bench of this Court in Appeal No.784 of 1991 *(Mrs.Pallavi R. Karani versus M/s.Dadhawala Builders Pvt. Ltd. And others)* considered the order and held that the order cannot be read as laying down that specific performance of a development can never be granted or that interim orders in such a suit must always be refused. Secondly, all the later judgments relied upon by Mr.Parekh have been delivered without the attention of the learned Judges being invited to the judgment in *Mrs.Pallavi R. Karani's* case dated 25.9.1991.

61(A). The next judgment relied upon by Mr.Parekh is also an unreported judgment dated 8.2.1991 in *M/s.Ghori & Khatri Builders (Regd.) versus Iqbal Hussein Usman Fakir Mohamed Mansoori and others* in Notice of Motion No.763 of 1989 in Suit No.844 of 1989. In that case too, the Plaintiff had agreed to finance the development / construction and by way of remuneration, the Plaintiff had agreed to take the entire second floor and one shop in the building to be constructed by the Plaintiff for the Defendants. The learned Judge held as under :-

> "The Plaintiffs are professional builders/contractors and their aim in entering into the suit agreement was to make profit by completing building and selling the flats therein. Breach of such an agreement can be compensated by way of damages. No interest in land has been created by the Defendants in favour of the Plaintiffs under the said agreement Mr.Vora on behalf of the Plaintiffs has strenuously relied upon clause 4 of the said agreement and in particular sub-clauses (a) and (b) thereof and submitted that in any event this clause

> incorporates an agreement between the Plaintiffs and the Defendants under which the Defendants had agreed to sell to the Plaintiffs the entire second floor of the building to be constructed and one shop and as such interest in the land has been created by the Defendants in favour of the Plaintiffs. I am afraid it is not possible to accept this contention. It is correct that under this clause the Defendants have agreed to give and allot to the Plaintiffs the premises mentioned in sub-clauses (a) and (b) thereof. However, this is nothing but mode of remunerating the Plaintiffs for the services of construction of the building which the Plaintiffs have agreed to render to the Defendants under the said agreement. Clause 23 of the said agreement further supports the view which I have taken to the effect that the agreement is nothing but a financing agreement of an agreement to develop the suit property."

(B). It is important to note two things about this judgment.

The learned Judge held that the suit being for

specific performance of a development agreement was not maintainable in view of the judgment of the Division Bench in *Narayanan Ramchandra versus Mahabhodi Society of India and Ors.* As I mentioned above, another Division Bench in *Mrs.Pallavi R. Karani's* case, construed this judgment and expressly held that it cannot be read as laying down that specific performance of a development agreement can never be granted or that interim reliefs in such a suit should always be refused. Thus the interpretation of the learned single Judge of the judgment of the Division Bench in *Narayanan Ramchandra versus Mahabhodi Society of India and Others,* stands impliedly overruled. In fact the learned Single Judge (S.M. Jhunjhunuwala, J.) who delivered this judgment was also a party to the subsequent judgment of the Division Bench in *Mrs.Pallavi R. Karani's* case.

(C). The judgment is also clearly distinguishable from the facts of this case. All that had happened was that the developer had made payment under the agreement to the owner. There was no work carried out by the developer. The developer did not even have possession of the

premises. The structures standing on the suit property were found to have been put up by the Defendants and not by the developer. In the present case, Defendant Nos.1 to 3 are in possession of the suit property, they have paid substantial amounts thereunder, carried out extensive work and entered into agreements with third parties.

62(A). The last judgment relied upon by Mr.Parekh was in the case of *Gurudev Developers versus Kurla Konkan Niwas Co-operative Housing Society,* 2000 (8) LJSOFT = 2000(3) Mh. L. J., 131. A learned single Judge considered the above judgments except the judgment of the Division Bench in *Mrs.Pallavi R. Karani versus M/s.Dadhawala Builders Pvt. Ltd. and others*. Thereafter the learned Judge notes the judgment in *M/s.Ghori and Khatri Builders.* As noted by the learned Judge in paragraph 7, it was in this view of the matter that he held prima-facie that a development agreement cannot be specifically enforced.

(B). As noted earlier, the subsequent Division Bench in *Mrs.Pallavi R. Karani's* case expressly held this interpretation of the order of the earlier Division Bench to be

incorrect. The judgment is therefore of no assistance to the Plaintiffs.

63. It is pertinent to note that the Division Bench in *Mrs.Pallavi R. Karani's* case was considering an Appeal from the order and judgment of a learned single Judge dated 14.8.1991. The learned single Judge had held that it would be impossible to grant specific performance of the agreement at the trial of the suit and that the only remedy of the Plaintiff therein was in damages. In arriving at this conclusion, the learned Judge had placed reliance upon the judgment of the Division Bench in *Narayanan Ramchandra's* case and the judgment of a learned single Judge in *M/s.Ghori & Khatri's* case. This view was expressly rejected by the Division Bench.

64. It is thus clear that the interpretation of the order and judgment of the Division Bench in *Narayanan Ramchandra's* case by the learned single Judges in *M/s.Ghori & Khatri's* case and in *Gurudev Developers* stand expressly overruled.

65. In the circumstances, it must be held that there is no absolute inflexible rule that development agreements can

never be specifically performed. It would depend upon the facts and circumstances of each case.

66. Even on this question of law, the least that must be said in favour of the Defendants is that it cannot be said with any degree of certainly that specific performance of the said agreement will not be granted or cannot be granted.

67. This leaves for consideration the question of balance of convenience.

68. If a mandatory order which would have the effect of virtually decreeing the Plaintiffs' suit and dismissing the counter-claim filed by Defendant Nos.1 to 3 at the interlocutory stage is refused, the Plaintiffs will suffer no harm or injury. This is more so in view of Mr.Madon's statement that pending the hearing and final disposal of the suit, the Defendants will not create any further third party rights or interest and also will not carry out any further construction on the suit property without seeking the leave of the Court. The statements are accepted.

69. On the other hand, if the mandatory reliefs as prayed for are granted and the Plaintiff is permitted to deal

with the property freely, it would be impossible to restore status-quo ante enabling Defendant Nos.1 to 3 enjoy the benefit of any decree that they may obtain in their counter-claim.

70. In the circumstances, the Notice of Motion is dismissed with costs, fixed at Rs.1000/- to be paid by the Plaintiffs to each of the Defendants.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1568 OF 2004
IN
SUIT NO.1455 OF 2004

DATE OF DECISION : 7TH/8TH DECEMBER, 2006.

FOR APPROVAL AND SIGNATURE :

HON'BLE MR.JUSTICE S.J. VAZIFDAR :

1. Whether Reporters of Local Papers may be allowed to see the judgment ?)

2. To be referred to the Reporter or not ?)